Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

DAVID R. MCKUNE, Warden
and CHARLES SIMMONS, Secretary,
Kansas Department of Corrections,
Petitioners,

v.

ROBERT G. LILE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Department
of Corrections
900 S.W. Jackson
Topeka, KS 66612-1284
(785) 296-3317

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue,
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

Counsel for Petitioners

QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

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OPINIONS BELOW

The September 5, 2000, decision of the United States Court of Appeals for the Tenth Circuit is reported at 224 F.3d 1175, and is included in the petition appendix. The decision of the District Court is reported at 24 F. Supp. 2d 1152, and is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on September 5, 2000, and denied a timely petition for rehearing and suggestion for rehearing en banc on October 24, 2000. This petition has been filed within ninety days of the latter date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

U.S. Const. amend V.

Kansas Department of Corrections Internal Management Policy and Procedure 11-101 provides that

> "An inmate shall remain on Level III provided he . . . shall be automatically reduced to Level I for . . . [d]ocumented refusal to participate in work assignments or recommended programs . . . ."

STATEMENT

1. *Nature of the Suit.* The Kansas Department of Corrections (KDOC) employs a comprehensive system of earnable inmate privileges in order to manage the offender

population and reinforce constructive behavioral changes. As part of this system, inmates work their way through privilege incentive levels in accordance with their behavior, at all times subject to reduction for disciplinary, work or recommended program infractions. Inmate Lile, a convicted sex offender[1], filed this suit after he was reduced to Level I (from Level III) for refusing to participate in his recommended treatment program, the Sexual Abuse Treatment Program (SATP), because it required him to accept responsibility for his sex crimes. Inmate Lile claims his privilege reduction to Level I for refusing to accept responsibility in sex offender treatment violates his Fifth Amendment privilege against self-incrimination.

2. *The District Court*. The District Court initially granted a temporary injunction to inmate Lile, precluding the KDOC from reducing his privilege incentive level and keeping him on the SATP waiting list. The District Court ultimately granted summary judgment to inmate Lile on his Fifth Amendment claim.[2] Petition Appendix ("Pet. App.") 37a-46a. Also, the District Court ordered the injunction continued until appellate review is completed. *Id.* at 54a-55a.

3. *The Tenth Circuit*. The Tenth Circuit affirmed the District Court. Pet. App. 3a-32a. The Tenth Circuit began its Fifth Amendment analysis by briefly addressing the incrimination component of the privilege. *Id.* at 6a-7a. The Sexual Abuse Treatment Program requires participating

[1] Robert G. Lile was convicted of aggravated kidnapping, rape, and aggravated sodomy in 1983 for forcibly raping a high school student after threatening her with a gun. *Lile v. McKune*, 45 F. Supp. 2d 1157, 1159 (D. Kan. 1999) (denying writ of habeas corpus); *see also State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985).

[2] In addition to his Fifth Amendment claim, inmate Lile raised a privacy claim maintaining that he had a constitutional right to refuse penile plethysmograph testing.

inmates to complete a written sexual history and to sign an Acceptance of Responsibility form. Inmates are not given immunity from prosecution for any of their disclosures. The Tenth Circuit found that the incrimination element of the Fifth Amendment privilege was satisfied here for two reasons. First, the written sexual history might require persons such as inmate Lile to reveal uncharged sexual offenses. *Id.* at 6a-7a. Second, completion of the Acceptance of Responsibility form could subject inmates such as Lile to perjury charges for having maintained their innocence at trial. *Id.* at 7a.

The Tenth Circuit then addressed the compulsion element of the privilege. The court began with an examination of the adverse consequences to an inmate for refusing to accept responsibility or provide a written sexual history. Observing that inmate Lile faced transfer to maximum security (from medium security) if he failed to comply with the SATP requirements, the court noted that such a "transfer would restrict [inmate Lile's] privileges." Pet. App. 10a.

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP [the prison's Internal Management Policies and Procedures programs]; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll . . . to $20 per payroll . . .; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Id.

The Tenth Circuit, however, concluded that Lile would not be denied parole nor lose any good time credits because he refused to participate in the SATP. Pet. App. 10a-12a. The Tenth Circuit thus concluded that the only adverse

consequences inmate Lile would suffer for refusing to participate in the SATP would be "transfer to maximum security prison and the resulting loss of privileges." *Id.* at 12a. According to the court, "[t]he critical question, then, is whether the State's imposition of these consequences in response to [inmate Lile's] invocation of his Fifth Amendment right against self-incrimination constitutes impermissible compulsion." *Id.* at 12a-13a.

In resolving the compulsion issue, the Tenth Circuit opined that "[t]here is no single test or factor that is dispositive, so we begin by examining Defendants' arguments." Pet. App. 13a. The court first addressed the argument that there is no compulsion here because inmate Lile's loss of privileges implicates no protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Although recognizing that changes in an inmate's prison classification ordinarily do not deprive him of a liberty interest, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Rather, the court held that "[c]ompulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests." *Id.* at 15a; *see also id.* at 17a ("It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the due process clause").

The Tenth Circuit then asserted that the "next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment." Pet. App. 17a. Reviewing again the changes in privileges that would accompany a move from maximum to medium security (including loss of a personal TV, *see* Pet. App. 17a), the Tenth Circuit concluded that "these

deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate." *Id.* at 18a. In reaching that conclusion, the court emphasized that a critical factor is that refusal to participate in the SATP, "standing alone," results in the loss of privileges. *Id.* at 19a.

The Tenth Circuit next considered the argument that there is no compulsion because participation in the SATP is voluntary and changing inmate Lile's privileges when he refused to participate is the *withholding of a privilege* rather than the imposition of punishment. The court opined that the fact that the change in privileges in this case automatically followed refusal to participate in the SATP undermined the argument that participation "is truly voluntary." Pet. App. 20a. In supporting that conclusion, the Tenth Circuit distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (inmate invoked privilege in clemency proceeding), and *Minnesota v. Murphy*, 465 U.S. 420 (1984) (person on probation claimed privilege)—both of which found no Fifth Amendment violation or compulsion—as cases in which the person was not "punished or penalized *solely* for choosing to remain silent." Pet. App. 22a.

The Tenth Circuit then turned to "[t]wo additional considerations" that it opined might be helpful in determining what constitutes compulsion. Pet. App. 23a. "The first is a distinction between a privilege and a penalty." *Id.* Acknowledging that such a distinction exists and that it may have constitutional significance in this context, the Tenth Circuit nonetheless concluded that inmate Lile's loss of privileges in this case is "properly characterized as imposing penalties." *Id.* at 24a.

The Tenth Circuit also considered "the automaticity of the penalty." Pet. App. 25a. Again, the court opined that Supreme Court decisions finding no compulsion in the context of probation, parole or clemency, all involved situations in

which adverse consequences for remaining silent were not "automatic." *Id.* at 25a. Thus, the court concluded that "the State has violated [inmate Lile's] Fifth Amendment right against self-incrimination." *Id.* at 26a.

Lastly, having found a constitutional violation, the Tenth Circuit applied the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires an assessment of "whether the prison policy at issue 'is reasonably related to legitimate penological interests.'" Pet. App. 27a (quoting *Turner*). The Tenth Circuit recognized that the state has legitimate interests in the public safety and rehabilitating sex offenders. *Id.* at 28a. The court also recognized that

> [t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, most mental health experts agree that a "sex offender must admit his guilt for treatment and rehabilitation to be successful."

Id. at 28a (internal citations omitted).

Nonetheless, the Tenth Circuit concluded that the balancing of interests favors inmate Lile, because (1) "there is no evidence that [inmate Lile] has any alternative means of exercising his Fifth Amendment right," Pet. App. 29a, (2) "there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources," *id.*, and (3) the alternative to the policy would be to grant immunity or privilege any statements disclosed by the inmate. *Id.* at 30a. Asserting that the state could still prosecute inmate Lile for other sex crimes—it just could not use any statements he made in the SATP—the Tenth Circuit concluded that "the *Turner* balancing easily weighs in favor of [inmate Lile]." *Id.* at 32a.

REASONS FOR GRANTING THE WRIT

The issue whether a State may withdraw privileges from a convicted sex offender for refusing to participate in a treatment program and accept responsibility for his crimes is one this Court decided to review previously, but the procedural posture of that earlier case ultimately prevented the Court from reaching the merits. *See Montana v. Imlay*, 506 U.S. 5 (1992) (dismissing the case because the offender would serve the same term of imprisonment regardless of the Court's resolution of the merits). Justice White, in his dissent from the dismissal, noted that:

> In the decision below, the Montana Supreme Court held that, "absent any grant of immunity" from prosecution for incriminating statements made during therapy, the Fifth Amendment "prohibit[s] augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts.

Imlay, 506 U.S. at 6.

The Court should take this opportunity to address the important constitutional question left unanswered in *Imlay*. The issue is cleanly presented in this case, there is no danger of mootness, the Tenth Circuit addresses the substantive issue at length in its opinion, and the Tenth Circuit's resolution of the issue is inconsistent with both this Court's and other courts' decisions. Indeed, this Court's decisions since it dismissed *Montana v. Imlay* almost ten years ago have strengthened the State's argument that the policy at issue here does not violate the Fifth Amendment.

Whether Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is An Important Issue That Merits This Court's Attention.

A. The Tenth Circuit's Decision That Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is Contrary To This Court's Recent Decisions.

In *Sandin v. Conner*, 515 U.S. 472 (1995), this Court recognized that "prisoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 485 (internal citation omitted) (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). Consequently, this Court held that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In other words, when an inmate has no constitutionally protected right to, or liberty interest in, a particular housing level, his constitutional rights cannot be violated when that housing level is changed.

Reducing prison privileges—in which an inmate has no constitutionally protected liberty interest—for failing to accept responsibility in treatment is not compulsion under the Fifth Amendment. This Court has held that neither (1) the threat of a reduced opportunity for clemency, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), (2) the threat of revocation of parole, *Minnesota v. Murphy*, 465 U.S. 420 (1984), nor (3) the threat of adverse inferences being drawn at a prison disciplinary hearing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), constitute compulsion under the Fifth Amendment. Nonetheless, the Tenth Circuit held in this case that the threat

of a reduction in institutional privileges constitutes compulsion under the Fifth Amendment.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), this Court held that a death row inmate could be forced to choose between incriminating himself or having adverse inferences drawn from his silence at his clemency interview. Despite the fact that "[i]n *Woodard*, plaintiff did not face a possible loss of privileges and benefits, but rather a possible loss of life," *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000), the Tenth Circuit distinguished *Woodard*, opining that "Mr. Woodard was not being punished for invoking the Fifth Amendment privilege." Pet. App. 20a-21a.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court held that the Fifth Amendment was not violated when a parolee was questioned by his parole officer about prior criminal activity after having been told that failure to be truthful could result in revocation of parole. In *Lile*, the Tenth Circuit relied on a footnote in *Murphy* in which this Court opined that "a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding." *Id.* at 435 n.7. However, Justice White, author of *Murphy*, later declared that any "assumption that this Court's decision in *Minnesota v. Murphy* mandates . . . immunity from prosecution based upon incriminating statements made to a therapist . . . reflect a possible misunderstanding of [a State's] obligations under the law." *Montana v. Imlay*, 506 U.S. 5, 8 (1992) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[*Minnesota v. Murphy*] does not, however, overrule the Court's earlier cases that state that the government can penalize someone for refusing to cooperate on government matters, even when the person does so by invoking his privilege against self-incrimination") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz v. Turley*,

414 U.S. 70, 84 (1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976)).

Finally, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that negative inferences could be drawn from an inmate's silence in a prison disciplinary hearing without violating the Fifth Amendment, in part because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.* at 319. The Tenth Circuit, however, distinguished *Baxter*, opining that "[h]ere, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation . . . standing alone, would certainly result in the [adverse consequences]." Pet. App. 19a. In *Baxter* the Court declared that

> [i]t is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State.

Baxter, at 317-18 (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that police officers questioned concerning alleged fixing of traffic tickets in their boroughs could not be threatened with loss of employment for refusing to answer); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (holding that statute precluding award of government contract to any person refusing to answer questions concerning state contract violated the Fifth Amendment)).

The Tenth Circuit's analysis ignores the fact that it is not inmate Lile's silence alone but rather his conviction of a sexual

offense, plus the recommendation for treatment, plus his refusal to participate in that treatment which results in adverse consequences. Seen in this light, this case is much more similar to *Baxter* than to either *Garrity* or *Lefkowitz*. *See Asherman v. Meachum*, 957 F.2d 978, 982 (2nd Cir. 1992) ("The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right") (citing *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968)); *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege")).

B. The Tenth Circuit's Decision Conflicts With The Decisions Of Other Circuits And A Decision Of The Kansas Supreme Court.

The Tenth Circuit recognized that other courts would disagree with its *Sandin* analysis in this case, citing the following:

> *But cf. Tedder* [*v. Francke*], 1991 WL 65497, at *2 [(9th Cir. 1991)] (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because he has no constitutional right to discretionary parole before the expiration of his sentence); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526 (6th Cir. 1988) (Table) (affirming district court determination that Fifth Amendment right against self-incrimination was not violated because plaintiff had no constitutionally protected liberty interest in discretionary parole).

Pet. App. 16a-17a. Indeed, the Tenth Circuit had to distinguish its own precedent in finding compulsion in this case: "To the extent that [our decision in] *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here." Pet. App. 16a n.8 (citing *Chambers v. Bachicha*, 39 F.3d 1191 (unpublished table decision), 1994 WL 596702, at *3 (10th Cir. 1994) (finding it "dispositive of our inquiry that there is no compulsion for Fifth Amendment purposes . . . [because] Appellant has no right to earned time").

The Tenth Circuit's holding also conflicts with the Kansas Supreme Court's explicit conclusion that

> The housing assignment given to an inmate, his or her custody classification, granting of parole, spending limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP.

Bankes v. Simmons, 265 Kan. 341, 351, 963 P.2d 412, 420 (1998). The Tenth Circuit's response to that decision is that "the liberty analysis should not be part of a Fifth Amendment privilege case." Pet. App. 17a n.9.

The Tenth Circuit's decision conflicts with the decisions of other Circuits and the Supreme Court of Kansas, and the constitutional question presented is an important one that warrants resolution by this Court.

C. The Tenth Circuit's Decision Provides This Court With An Opportunity To Consider Whether The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test Applies In The Fifth Amendment Context.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court then set out the following "factors that are relevant in determining the reasonableness of the regulation at issue": (1) whether there is a valid, rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates an alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89-91.

After finding a Fifth Amendment violation in this case, the Tenth Circuit applied the *Turner* balancing test and found that it "easily" weighed in favor of inmate Lile. Pet. App. 32a. However, it may be inappropriate to apply the *Turner* factors in the Fifth Amendment context. *Turner* involved claims under the First Amendment and the constitutional right to marry. Courts, including the Tenth Circuit itself, have recognized that application of the factors set forth in *Turner* to other constitutional claims may be inappropriate. *See, e.g., Dunn v. White*, 880 F.2d 1188, 1194 n.3 (10th Cir. 1989) ("The *Turner* test appears analytically to have only limited applicability to a prisoner's fourth amendment challenge"); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988) (noting that the second *Turner* factor is "much more meaningful in the first amendment context than the fourth, where the right is to be free from a particular wrong"); *see also Foote v. Spiegel*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) ("After careful

consideration, this court determines that the Supreme Court's decision in *Washington* only commands use of the *Turner* 'standard of review' (i.e. reasonableness instead of strict scrutiny) when assessing prisoners' or detainees' constitutional claims; it does not command the use of the *Turner* factors themselves") (citing *Washington v. Harper*, 494 U.S. 210 (1990)).

It does not appear that this Court has ever applied *Turner* to a case involving the Fifth Amendment. Thus, this case presents the Court with an opportunity to address whether, and if so how, the *Turner* balancing test and factors apply to inmates' Fifth Amendment claims.

D. The Extent To Which Correctional Institution Privileges May Be Used To Encourage Inmates To Participate In Sex Offender Treatment Programs Is An Important Question.

As noted above, the Court previously granted review in a case raising many of these issues in the related context of probation. At that time, one neutral *amicus* pointed out the importance of incentives for effective sex offender treatment:

> Denial is a common phenomenon in offender treatment. As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed. Certain offenders continue to deny the abuse, however, despite the best efforts of therapists . . . . Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole.

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party at 2, 8, *Montana v. Imlay*, 506 U.S. 5 (1992) (No. 91-687).

Prison administrators need a definitive answer to the question presented in this case, in order to determine how best to protect the public safety and to manage their growing sex offender populations. Treatment programs have proven effective, but they will be much less so absent strong incentives for inmates to participate. A decision in this case by this Court will affect potentially thousands of inmates and directly implicates the public safety.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Department
of Corrections
900 S.W. Jackson
Topeka, KS 66612-1284
(785) 296-3317

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue,
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

January, 2001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE, Plaintiff-Appellee/ Cross-Appellant, v. DAVID R. MCKUNE; CHARLES SIMMONS, Defendants-Appellants/ Cross Appellees.	Nos. 98-3292 & 98-3294

ORDER

Filed October 24, 2000

Before SEYMOUR, Chief Judge, McKAY, and EBEL, Circuit Judges.

Appellants/Cross-Appellees' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Appellants/Cross-Appellees' reply received by this court on October 17, 2000, hereby refused as unauthorized by this court.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: [illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE, Plaintiff-Appellee/ Cross-Appellant, v. DAVID R. MCKUNE; CHARLES SIMMONS, Defendants-Appellants/ Cross Appellees.	Nos. 98-3292 & 98-3294

Sept. 5, 2000

Before SEYMOUR, Chief Judge, McKAY and EBEL, Circuit Judges.

McKAY, Circuit Judge.

These cross-appeals arise out of an action brought by Plaintiff Robert G. Lile under 42 U.S.C. § 1983. Plaintiff is a prisoner at the Lansing Correctional Facility in Lansing, Kansas. On January 6, 1983, he was convicted in Kansas state court of aggravated kidnaping, rape, and aggravated sodomy.[1] He pleaded not guilty to these charges and testified at trial that

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[1] Kansas courts affirmed Plaintiff's convictions on direct appeal, *see State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985), and rejected his applications for postconviction relief. In March 1999, the United States District Court for the District of Kansas denied Plaintiff's 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See Lile v. McKune*, 45 F. Supp. 2d 1157 (D.Kan.1999).

he had consensual intercourse with the alleged victim. Though not part of his original sentence, the Kansas Department of Corrections recommended in 1994 that Plaintiff participate in the Sexual Abuse Treatment Program[2] [SATP or program] because he had been convicted of sex offenses and added it to his Inmate Program Agreement [IPA]. To be admitted into the program, Plaintiff was required to disclose his sexual history, including the crime of which he was convicted and any uncharged sexual offenses. He refused to make any such admissions and, on October 11, 1994, refused to sign his amended IPA.

After pursuing his administrative remedies without success, Plaintiff filed a § 1983 action against the State, naming the warden of the Lansing Correctional Facility and the Secretary of the Kansas Department of Corrections as defendants. He claimed first that the SATP and its corresponding regulations and policies violated his Fifth Amendment right against self-incrimination and second that the implementation of the SATP violated his Fourth Amendment right to privacy and bodily integrity. Specifically, he argued that Defendants' policy of withholding privileges and benefits penalized him for refusing to provide potentially incriminating information related to past sexual behavior or offenses and therefore violated his Fifth Amendment right against self-incrimination. He also complained that his Fourth Amendment rights were violated by the intrusive nature of the plethysmograph examination.

Ruling on cross-motions for summary judgment, the district court granted summary judgment to Plaintiff on his claim that the SATP violated his Fifth Amendment right against self-incrimination, but it granted summary judgment to

[2] In 1994, the treatment program was known as the Sex Offender Treatment Program or SOTP. Because the program is now called the SATP, we shall refer to it as such in this opinion.

Defendants on the Fourth Amendment claim. *See Lile v. McKune*, 24 F. Supp. 2d 1152 (D.Kan. 1998). We exercise jurisdiction under 28 U.S.C. § 1291.[3]

We review the denial or the grant of summary judgment de novo, applying the same legal standard used by the district court. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is properly granted where, viewing the factual record and the reasonable inferences therefrom in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Charter Canyon Treatment Ctr. v. Pool Co.*, 153 F.3d 1132, 1135 (10th Cir.1998).

I. Fifth Amendment

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Although this language is somewhat narrow, the Supreme Court has interpreted it broadly. *See, e.g., In re Gault*, 387 U.S. 1, 50 (1967) (The privilege is to be "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom."). The right not only applies to an individual's criminal trial but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973);

[3] This court has appellate jurisdiction over the district court's September 16, 1998 Order granting summary judgment to Plaintiff on his Fifth Amendment claim and granting summary judgment to Defendants on Plaintiff's Fourth Amendment privacy claim. According to the district court's subsequently filed December 29, 1998 Order, "no claim remains to be decided" and the September 16 Order was "intended as a final appealable order under 28 U.S.C. § 1291." App., Vol. 1 at 254.

see Minnesota v. Murphy, 465 U.S. 420, 426 (1984). The privilege has two components: incrimination and compulsion. Although it is not entirely clear whether Defendants assert that the SATP was not incriminating, we briefly address this issue.

A. Incrimination

The privilege guarantees every person the right to remain silent when faced with a real and appreciable risk of incrimination in a criminal proceeding. *See Minor v. United States*, 396 U.S. 87, 98 (1969). If the possibility of incrimination is too speculative or insubstantial, the privilege does not attach. *See id.*

In this case, the district court found that "the information required to be disclosed under the SATP ... is sufficiently incriminating for Fifth Amendment purposes." *Lile*, 24 F. Supp. 2d at 1157. We agree with the district court that "[b]y requiring the complete and written disclosure of a prisoner's sexual history, including all uncharged sexual offenses, SATP clearly [sought] information that could incriminate the prisoner and subject him to further criminal charges." *Id.* (footnote omitted). This is especially true in this case because no confidentiality is afforded such disclosures; an admission of any information concerning uncharged sexual offenses against minors must be turned over by the SATP staff to the proper authorities under Kansas law. *See* Supp.App. at 253; Kan. Stat. Ann. § 38-1522 (mandating reporting of abuse or neglect of children). In addition, all SATP files, including the sexual history form, are subject to disclosure by subpoena or other court order. *See* Supp.App. at 116-18, 253; 42 C.F.R. §§ 2.63(a)(2), 2.65 (authorizing disclosure of confidential communications and patient records for criminal investigation or prosecution of patient); *see also Lile*, 24 F. Supp. 2d at 1157 n. 7 (distinguishing *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir.1994) (Table), which found no Fifth Amendment violation in part because of confidentiality of prison records); *cf. Neal v.*

Shimoda, 131 F.3d 818, 833 & n. 18 (9th Cir. 1997) (rejecting Fifth Amendment self-incrimination claim because of absence of evidence of a real possibility that state would use admission to sex offenses against plaintiffs in future criminal proceeding and because "there [was] no danger that [an] ... inmate would be compelled to admit to other sexual misconduct of which prison or law enforcement officials were not already aware"); *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497 (9th Cir.1991) (Table) (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because admissions made would be privileged under Oregon evidence rule). Plaintiff knew that any incriminating information he disclosed could be used to prosecute him. In fact, Defendants concede that inmates are "advised that information obtained during the course of treatment [in the SATP] has limited confidentiality" and will be given to law enforcement officials if prosecutable. Defendants' Third Br. at 3.

Additionally, an admission of culpability regarding the crime of which Plaintiff was convicted would put him at an appreciable risk for a perjury prosecution, especially because he testified at trial that he was not guilty. *See Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966); *State v. Cate*, 165 Vt. 404, 683 A.2d 1010, 1019 (1996). Having determined that the incrimination element of the Fifth Amendment privilege analysis is satisfied, we now turn to the more difficult issue of compulsion.

B. Compulsion

In *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977), the Supreme Court emphasized that "the touchstone of the Fifth Amendment is compulsion" and recognized that the imposition of penalties is the mechanism by which persons are compelled to incriminate themselves. *See id.* at 804-05; *Garner v. United States*, 424 U.S. 648, 653 (1976). The privilege provides an individual with the right "not to answer

official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Turley*, 414 U.S. at 77.

After finding that the disclosure of Plaintiff's sexual history required by the SATP was "sufficiently incriminating for Fifth Amendment purposes," *Lile*, 24 F. Supp. 2d at 1157, the district court determined that the SATP and its corresponding regulations and policies impose significant adverse consequences on Plaintiff and "operate[ ] to compel the disclosure of such incriminating testimony" in violation of the Fifth Amendment privilege. *Id.*

Defendants argue that the court "erred in concluding that the withholding of discretionary privileges from an inmate as a consequence of the inmate's refusal to participate in a rehabilitation program constituted compulsion within the meaning of the Fifth Amendment." Appellants' Br. at 7. They claim that no compulsion exists because Plaintiff's decision to participate or not participate in the SATP is voluntary and because Plaintiff has no protected liberty interest in any of the privileges that would be withheld.

In response, Plaintiff argues that by requiring him to complete an admission of responsibility form and disclose his sexual history, and by imposing adverse consequences for his failure to do so, the SATP unconstitutionally compels him to reveal potentially incriminating information about his sexual history and thus violates his Fifth Amendment right against self-incrimination.

Supreme Court jurisprudence concerning the Fifth Amendment right against self-incrimination instructs that, unless an individual is given immunity at the time of his potentially incriminating testimony, he may not be confronted with the dilemma of either answering questions that may incriminate him or being substantially penalized solely for the

assertion of his constitutional privilege. *See Garner*, 424 U.S. at 661 (indicating that where the assertion of the privilege is penalized it "foreclos[es] a free choice to remain silent[ ] and therefore ... compel[s] the incriminating testimony"). In other words, "a State may not impose substantial penalties because a [declarant] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Cunningham*, 431 U.S. at 805; *see also Murphy*, 465 U.S. at 434. Resolution of the compulsion question in this case then turns on whether the consequences of Plaintiff's refusal to admit responsibility for his charged and uncharged sexual offenses constitute substantial penalties that are impermissibly coercive.

1. Adverse Consequences

In order to properly assess whether there has been a violation of the Fifth Amendment, it is essential to understand the precise nature of the adverse consequences that result from Plaintiff's refusal to sign an Admission of Responsibility form and disclose his sexual history. Plaintiff asserts that he would suffer the following consequences: Termination from the SATP and the resulting transfer out of a medium security facility into maximum security housing; loss of visitation, job, canteen, and prison programming privileges; denial of eligibility for parole; and denial of the opportunity to earn good-time credits.

The record reflects that Plaintiff would, in fact, be subject to a transfer out of medium security to maximum security for his refusal to participate in the SATP by refusing to admit responsibility.[4] According to the Kansas Department of

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[4] In an order filed April 23, 1996, the district court granted Plaintiff temporary injunctive relief directing Defendants to keep Plaintiff on the SATP waiting list and enjoining them from applying the privileges and incentives program to Plaintiff because of his refusal to admit responsibility for his offense and disclose his sexual history as required by the SATP.

Corrections' Internal Management Policies and Procedures [IMPP], Plaintiff's incentive level would be automatically reduced from Level III to Level I. *See* App., Vol. I at 23-24 (IMPP Rule 11-101). Practically, this means that the Department would automatically transfer Plaintiff from a medium security facility to maximum security housing. *See id.* at 24; Supp.App. at 285. This change in incentive level and transfer would restrict Plaintiff's privileges. Specifically, he would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll at Level III to $20 per payroll at Level I; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges. *See* App. at 29.

Turning to Plaintiff's claim that he would be denied parole for his refusal to participate in the SATP, Plaintiff cites Kan. Stat. Ann. §§ 75-5210a and 22-3717.[5] Section 22-3717(g) provides:

> [T]he Kansas parole board may release on parole those persons confined in institutions who are eligible for parole when: ... (2) the secretary of corrections has reported to the board in writing that the inmate has satisfactorily completed the programs required by any agreement entered under K.S.A. § 75-5210a and amendments thereto, or any revision of such agreement.

[5] Though Plaintiff cites § 22-3717(k) in support of his claim that he will be denied eligibility for parole, that section appears to have no bearing on the issues in this case. Subsection (k) states, "Parolees and persons on post-release supervision shall be assigned, upon release to the appropriate level of supervision pursuant to the criteria established by the secretary of corrections." Kan. Stat. Ann. § 22-3717(k).

Section 75-5210a requires an inmate and the secretary of corrections to enter into a written agreement "specifying those educational, vocational, mental health or other programs which the secretary determines the inmate must satisfactorily complete in order to be prepared for release on parole or postrelease supervision."

According to the record, Plaintiff entered into a program agreement and promised to complete the Sexual Offender Treatment Program (the precursor to the SATP) on June 1, 1995. Although the language of §§ 75-5210a and 22-3717(g) suggests that Plaintiff is required to complete the SATP in order to be eligible for parole, this is not the case. In *Payne v. Kansas Parole Board*, 20 Kan. App. 2d 301, 887 P.2d 147, 150 (1994), the Kansas Court of Appeals held that §§ 75-5210a and 22-3717(g)(2), which became effective on March 1, 1995, do not apply retroactively. The *Payne* court noted that "[§] 75-5210a directs the Secretary of Corrections to enter into program agreements only with newly committed inmates" and that "successful completion of a program agreement was not a prerequisite for parole prior to the 1988 enactments." *Id.* Like the petitioner in *Payne*, Plaintiff's conviction in 1983 occurred long before these provisions were enacted. Thus, under *Payne*, Plaintiff is not required to enter into or complete a program agreement pursuant to §§ 75-5210a and 22-3717(g)(2) to be eligible for parole. *See id.*; *see also Johnston v. Simmons*, 45 F. Supp. 2d 1220, 1224 (D.Kan. 1999) (relying on *Payne* to hold that §§ 75-5210a and 22-3717 did not result in an ex post facto violation where plaintiff had been convicted prior to the effective date of these provisions because "plaintiff is not required to enter into a program agreement, nor is he required to complete any agreed programs as a condition of his parole").

Plaintiff has also failed to demonstrate that he would lose good-time credits for his refusal to participate in the SATP. Plaintiff's assertion in his brief that he would suffer such a

consequence is not supported by the record or legal authority. Under Kan. Admin. Reg. §§ 44-6-124(g)(6) and 44-6-142, some Kansas inmates may lose good-time credits for their refusal to complete a program such as the SATP. Section 44-6-142 provides that "good time credits shall be awarded on an earned basis pursuant to [§] 44-6-142 for the purpose of determining the conditional release date,"[6] and § 44-6-142 states that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period." However, Plaintiff's good-time credits are not calculated by reference to these regulations because he was convicted prior to March 1, 1995. *See Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412, 421 (1998) (holding that application of these regulations to inmates convicted prior to March 1, 1995, violates the prohibition in the United States Constitution against ex post facto laws), *cert. denied*, *Hannigan v. Stansbury*, 525 U.S. 1060 (1998); *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227, 230, 236 (1998) (same with respect to inmate who was convicted of rape in 1991 and refused to participate in the SATP), *cert. denied*, 525 U.S. 1060 (1998). Plaintiff's good-time credits therefore are calculated under the old regulations which do not penalize inmates for the failure to participate in the SATP. *See Stansbury*, 960 P.2d at 233.

As a result, the adverse consequences that Plaintiff would face for the refusal to participate in the SATP are the transfer to maximum security prison and the resulting loss of privileges. The critical question, then, is whether the State's imposition of these consequences in response to Plaintiff's invocation of his

[6] This means that, for qualifying prisoners, good-time credits are earned as the sentence progresses rather than presumed based upon maximum conduct and subject to forfeiture for misconduct.

Fifth Amendment right against self-incrimination constitutes impermissible compulsion.

2. Analyzing Compulsion

Determining whether the challenged policy or action is compulsory for Fifth Amendment purposes is a difficult task that depends upon consideration of many factors. There is no single test or factor that is dispositive, so we begin by examining Defendants' arguments.

a. The *Sandin* Analysis

Defendants argue that no compulsion exists because the adverse consequences present in this case implicate no protected liberty interest. Specifically, they claim that the Fifth Amendment is not violated because the consequences that would be imposed on Plaintiff as a result of his refusal to admit responsibility and disclose his past sex offenses do not constitute "atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

In *Sandin*, the Supreme Court addressed liberty interests in prison in the context of a procedural due process claim. The Court held that, despite the mandatory language of the applicable prison regulation, a constitutionally protected liberty interest will generally be "limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484 (citations omitted). Applying this test, the Court held that being placed in disciplinary segregation for thirty days did not impose an atypical and significant hardship, and therefore the inmate had no protected liberty interest which required due process. *See id.* at 486. Relying on earlier Supreme Court precedent, *Meachum v. Fano*, 427 U.S. 215, 225 (1976), this court recognized that, under the Due Process Clause, a change in "an inmate's prison classification ordinarily does not deprive him of liberty[ ] because he is not entitled to a particular degree

of liberty in prison." *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994).

However, nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur.[7] *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285-88 (1998) (evaluating Fifth Amendment claim without any reference to liberty analysis and applying liberty interest analysis to due process claim only). From our review of the cases, *Sandin* has not been expressly used to analyze any kind of constitutional right claimed by a prisoner other than a due process violation. Moreover, nothing in either Supreme Court or Tenth Circuit precedent "expressly rule[s] out a challenge to a [prison policy] ... on the ground that it violate[s] constitutional rights other than the right to procedural due process." *Furtado v. Bishop*, 604 F.2d 80, 87 (1st Cir. 1979) (explaining that Supreme Court precedent allows that a prisoner's confinement could violate the constitution even if it did not implicate a liberty

[7] In their brief, Defendants imply that the Eight Circuit's decision in *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996), is one in which the court determined that there was no compulsion under the Fifth Amendment because the prisoner had no liberty interest in remaining in a work-release program. *See* Appellants' Br. at 15-16. Defendants' reliance on *Callender* is misplaced. In that case, the district court held that the prisoner's procedural due process rights had been violated because he was deprived of the liberty interest of remaining in the work-release program. The district court also held that requiring the prisoner to admit his guilt violated the Fifth Amendment right against self-incrimination but that the treatment center was entitled to qualified immunity on that claim. The Eight Circuit reversed. Observing that a sex offender program was part of the work- release program, the court held that revocation of the work- release program based on the prisoner's refusal to admit guilt did not violate the *Due Process Clause* because no liberty interest was implicated. The Eight Circuit did not address the Fifth Amendment claim. *See Callender*, 88 F.3d at 668-69.

interest or violate due process); *see also Frazier v. Dubois*, 922 F.2d 560, 561 (10th Cir. 1990) (surveying circuit court decisions and holding that "*Meachum* addressed only the due process clause"). This reasoning is equally applicable to a challenge to a sex offender treatment program based on a Fifth Amendment violation. *Cf. Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. 1994) (Table) (rejecting equal protection and due process claims because plaintiff challenging Colorado sex offender treatment program had no protected liberty interest in good-time or earned-time credit under discretionary Colorado statute, but not addressing liberty question with respect to Fifth Amendment claim); *Colman v. Lahouse*, 976 F.2d 724, 1992 WL 235534, at *3 (1st Cir. 1992) (relying on *Furtado* to state that Fifth Amendment claim challenging sex offender treatment program has an arguable legal basis because no liberty interest is required).

Accordingly, we agree with the district court's assessment that "by grafting a protected liberty interest to a finding of compulsion, the standard is set too high." *Lile*, 24 F. Supp. 2d at 1159. Compulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests. The Supreme Court has indeed articulated several different types of penalties that constitute impermissible compulsion, none of which are explicitly characterized as deprivations of protected liberty interests. These include the threat of disbarment, damage to professional reputation, or loss of income, *see Spevack v. Klein*, 385 U.S. 511, 516 (1967) (describing such penalties as "powerful forms of compulsion"), economic penalties such as the loss of employment, *see Turley*, 414 U.S. at 82 (ruling that cancellation of contracts and five-year disqualification to contract constituted impermissible economic compulsion); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968) (holding that discharge for invoking and refusing to waive constitutional right against self-incrimination impaired Fifth Amendment privilege); *Garrity v. New Jersey*, 385 U.S. 493,

500 (1967) (holding that penalty of discharge for reliance on right to remain silent compelled policemen's incriminating testimony because it foreclosed a free choice to remain silent, and right against self-incrimination "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office"), and the loss of the right to participate in political associations, *see Cunningham*, 431 U.S. at 808-09 (depriving attorney of position as an unpaid political party officer would "impinge on his right to participate in private political associations"). *See also Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968) (reversing policeman's dismissal which was based solely on his refusal to waive immunity to which he would be entitled under the Fifth Amendment privilege against self-incrimination). There is nothing in our precedent that says a challenger must demonstrate a liberty interest to prevail on a Fifth Amendment right against self-incrimination claim.[8] *But cf. Tedder*, 1991 WL 65497, at *2 (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because he has no constitutional right to discretionary parole before the expiration of his sentence); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526 (6th Cir. 1988) (Table) (affirming district

[8] In an unpublished decision, a panel of this court examined a similar Fifth Amendment challenge to a Colorado Department of Corrections' sex offender treatment program. *See Chambers*, 1994 WL 596702, at *3. The plaintiff alleged that the prison's policy of reducing the amount of good time for which he was eligible because he refused to admit he was a sexual offender violated his right against self- incrimination. The court held that there was no Fifth Amendment violation in part because the applicable regulation issued by the Department of Corrections mandated that information gained from the program remain confidential and in part because "there [was] no compulsion for Fifth Amendment purposes." *Id.* at *3. To the extent that *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here. *See In re Citation of Unpublished Opinions/Orders & Judgments*, 151 F.R.D. 470 (10th Cir. 1993).

court determination that Fifth Amendment right against self-incrimination was not violated because plaintiff had no constitutionally protected liberty interest in discretionary parole). It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the due process clause.[9]

b. Substantial and Potent Penalties

The next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment. *See Cunningham*, 431 U.S. at 805. Defendants argue that the prison's privileges and incentives program does not employ sanctions or penalties within the meaning of the Fifth Amendment. We are not so persuaded.

As noted above, Plaintiff's refusal to admit responsibility and disclose his sexual history would result in a transfer from medium security prison to maximum security. This transfer goes hand in hand with a reduction in the inmate's classification, from Level III to Level I, which would result in the loss and restrictions of many privileges. These include the loss of participation in prison organizations and activities, including the IMPP; the loss of personal TV; substantially restricted access to the yard area and gym; substantially

[9] While we do not necessarily disagree with the Kansas Supreme Court's determination that an inmate's housing and custody classifications and other privileges attendant to those classifications "are not atypical and do not pose a significant hardship within a prison" within the meaning of the due process clause, *Bankes v. Simmons*, 963 P.2d at 420, our holding instructs that the liberty analysis should not be part of a Fifth Amendment privilege case. *Cf. Stansbury v. Hannigan*, 960 P.2d at 238 (considering appropriately in due process analysis that "[t]he restrictions imposed at Level I do not impose an atypical or significant hardship ... on an inmate which would not have been contemplated in his or her original sentence").

restricted visitation rights; significantly restricted purchasing rights at the canteen in terms of the amount of dollars the inmate is permitted to spend per payroll period; reduction in incentive pay and corresponding job opportunities; and restricted ability to retain personal property. *See* App. at 29; Supp.App. at 100-01; *see also* Supp.App. at 66-68 (describing how much more dangerous maximum security is). In addition, the Warden of the Lansing Correctional Facility and the Secretary of the Kansas Department of Corrections confirmed by their deposition testimony that these and other restrictions would occur with the transfer of an inmate from Level III to Level I. *See* Supp.App. at 72 (admitting reduction in open yard schedule); Supp.App. at 80 (explaining movement from two-person cell in medium security to four-person cell or dorm in maximum security); Supp.App. at 81 (describing restrictions); Supp.App. at 103 (describing the greater potential for violence in maximum security); Supp.App. at 285 (explaining consequences for refusal to participate in program agreement).

We conclude that these deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate. *Cf. Brooker v. Warden*, No. 98-466-JD, 1999 WL 813893, at *4 (D.N.H. June 22, 1999) (recognizing "coercive effect of a requirement that an inmate satisfactorily participate in a sex offender treatment program" as a prerequisite to parole, but finding no compulsion because inmate voluntarily participated in program and because "he could choose not to participate without increasing the hardship of his incarceration since he was not subject to any additional punishment for refusing to participate").

The Supreme Court's decision in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), also illustrates how the consequences in this case constitute penalties within the Fifth Amendment. Mr. Palmigiano was an inmate of the Rhode Island Correctional

Institution serving a life sentence for murder. He was charged with a disciplinary infraction, and, during his disciplinary hearing, he was told "that he had a right to remain silent but that if he remained silent his silence would be held against him." *Id.* at 312. The Court held that an adverse inference may be drawn from a defendant's decision to remain silent at a prison disciplinary hearing without violating the prisoner's Fifth Amendment rights. *Id.* at 320. The Court reasoned that "a prison inmate in Rhode Island electing to remain silent during his disciplinary hearing ... is not ... automatically found guilty of the infraction with which he has been charged" because of his silence. *Id.* at 317. Thus, because "an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board," the court determined that the case was "very different from the circumstances before the court in the *Garrity-Lefkowitz* decisions, where refusal to submit to the interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to other evidence, resulted in loss of employment." *Id.* at 318.

The consequences at issue in this case are more like those in the *Garrity-Lefkowitz* decisions than in *Baxter*. Here, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation-to disclose the required information about his sexual history-standing alone, would certainly result in the transfer to Level I and the corresponding loss and restriction of many privileges. As a result, we think the substantial penalties imposed in this case rise above the threshold limit of consequences set forth in *Baxter* which are acceptable and do not violate the Fifth Amendment.

c. Voluntary Proceeding or Program

Defendants also claim that the adverse consequences imposed in this case are not compulsory because Plaintiff could choose not to participate in the SATP. In other words, Defendants assert that Plaintiff's participation in the SATP is voluntary.

The record offers differing evidence concerning whether participation in the SATP is officially required by Department regulations. It appears that the program was required when Plaintiff was first recommended for it in 1994. The policy has since been amended such that, officially, inmates may "volunteer" to enter the SATP. However, even if participation in the SATP is not officially required of every sex offender, the policy of imposing certain administrative consequences upon an inmate in the event that he refuses to participate lends an element of compulsion. In light of the fact that the Department would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination, we cannot see how his participation in the SATP is truly voluntary.

In addition, we think this case is distinguishable from the Supreme Court's recent decision in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272. In *Woodard*, the Court characterized the inquiry as "whether giving inmates the option of voluntarily participating in an interview as part of the clemency process violates an inmate's Fifth Amendment rights." *Id.* at 276. Mr. Woodard, a death row inmate, argued that because there was only one guaranteed clemency review and because his answers could have been used against him the interview was not truly voluntary and therefore it violated the Fifth Amendment. *See id.* at 285. The Court rejected this claim, concluding that the interview was voluntary and, as a result, Mr. Woodard was not compelled to speak. *See id.* at 286. Because Mr. Woodard retained the choice whether to "provid[e] information to the [Parole] Authority-at the risk of damaging his case for clemency or for postconviction relief-or ... [to] remain[ ] silent[,] ... [t]he pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled." *Id.* at 287-88.

This case is distinguishable from *Woodard* for the simple reason that Mr. Woodard was not punished for invoking the

Fifth Amendment privilege. Rather, the clemency interview was voluntary and Mr. Woodard's eligibility for clemency did not depend on his participation in the interview. Though his participation in the clemency interview may have affected his chances for clemency, no separate and distinct substantial or potent consequences were imposed for his refusal to participate in the interview. Plaintiff in this case, however, is punished for refusing to participate in the SATP and invoking his Fifth Amendment privilege. Unlike the situation in *Woodard*, Plaintiff is not even eligible for the SATP without disclosing the requisite information about his sexual history, and his refusal to disclose is met with very specific, potent, and substantial consequences.[10]

This case also differs from the Supreme Court's decision in *Minnesota v. Murphy*, 465 U.S. 420. In that case, the Supreme Court addressed the Fifth Amendment privilege in a probation setting. Mr. Murphy was charged with criminal sexual conduct, pleaded guilty to a reduced charge, was placed on probation, and was required to participate in a sexual offender treatment program. In the course of the program, Mr.

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[10] Our decision that participation in the SATP is not voluntary is in direct opposition to the decision in *Searcy v. Simmons*, 97 F.Supp.2d 1055, 1059 (D.Kan. 2000). In *Searcy*, the district court interpreted *Woodard* as saying that there was no compulsion even though the inmate faced the loss of life. Based on this interpretation, the court concluded that there could be no compulsion from the loss of privileges and benefits. It therefore determined that the plaintiff's Fifth Amendment right against self-incrimination was not violated by the Kansas Department of Corrections' IMPP 11-101 and SATP because the court viewed participation in the SATP as voluntary. *See id.* We disagree with the *Searcy* court's characterization of *Woodard* and its resulting decision on the Fifth Amendment claim. Mr. Woodard was not facing a choice between clemency or no clemency (i.e., between life or death) depending on whether he participated in the clemency interview. Indeed, the clemency review process would occur with or without his participation. *See Woodard*, 523 U.S. at 276, 287-88.

Murphy, without claiming his Fifth Amendment right against self-incrimination, admitted to an earlier rape and murder for which he was subsequently prosecuted. Bringing a § 1983 action, he argued that the confession was inadmissible because he was compelled to admit the crimes or face revocation of probation. *See id.* at 434.

Relying on *Cunningham*, *Turley*, and other precedent, the Court observed that there was "a substantial basis" for concluding that an express or implied threat to revoke a convicted defendant's probation because he legitimately invoked the Fifth Amendment privilege would create "the classic penalty situation ... and the probationer's answers would be deemed compelled." *Id.* at 435. Despite these pronouncements, the Court held that, although the state conditioned probation on the giving of truthful answers in the therapy program, it did not violate the Fifth Amendment because it had not "attempt[ed] to take the extra, impermissible step" of compelling the answers. *Id.* at 436; *see also id.* at 437. Thus, because Mr. Murphy was not required to disclose specific incriminating statements but merely was required to be truthful to his probation officer, and because he was not threatened with a penalty for invoking the privilege, the Court held that the state did not violate the Fifth Amendment. *See id.* at 437, 440.

It is significant that Mr. Murphy was not required to disclose any specific information, nor was he penalized or punished for invoking his constitutional right. In short, other than the normal consequences flowing from his confession, Mr. Murphy was not punished or penalized *solely* for choosing to remain silent. However, that is exactly what would happen to Plaintiff here. Defendants' policy would respond to his refusal to admit responsibility and disclose his sexual history by transferring him to a higher level of security and substantially restricting the privileges that he had earned in the lower level of security.

d. Other Analytical Factors

Two additional considerations may generally be helpful in determining whether state action constitutes impermissible compulsion. The first is a distinction drawn between a privilege and a penalty. Defendants argue that a transfer from medium to maximum security housing and the attendant loss of privileges for refusing to participate in a prisoner treatment program do not constitute a penalty or punishment. Rather, these consequences are merely part of the Department's system of privileges and incentives utilized to encourage inmates to participate in programs. In other words, the State argues that punishment only occurs in response to a wrongful act taken by a prisoner.

This circuit has held that the characterization of state action as either withdrawing a privilege or imposing a penalty is indicative of whether the action constitutes compulsion. In *United States v. Rogers*, 921 F.2d 975, 982 (10th Cir.1995), the court held that "the denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of sentence" for purpose of the Fifth Amendment. In reaching this conclusion, we explained:

> There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed offense level. "'It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense.'"

Id. at 982-83 (citations omitted).

We do not believe that the distinction between a penalty and a privilege should be used as an absolute test for compulsion, but we believe that the distinction may be helpful in determining whether the government has sought to compel

self-incriminating testimony.[11] Though it would be inappropriate to find compulsion in a situation where the state has unquestionably imposed a penalty but that penalty is so de minimis in nature as to have no compulsive effect, that is not the situation here. In this case, Plaintiff was placed in medium security housing before prison staff recommended that he participate in the SATP. His participation in the SATP was not part of his sentence or court-ordered. As noted by the district court, the consequences attendant to an inmate's refusal to participate in the SATP under IMPP 11-101 are exactly the same as those "punishments" automatically imposed upon a prisoner for termination from a work assignment for cause, offenses for which felony charges are filed by a state prosecutor, or disciplinary convictions for offenses such as theft, drunkenness, use of narcotics, sodomy, riot, arson, assault, sexual activity, a relationship with staff, and possession of contraband. *See* App., Vol. I at 24-25; *Lile*, 24 F. Supp. 2d at 1155 n. 3. Thus, it appears that in this case the Department's transfer action and the resulting loss of privileges are properly characterized as imposing penalties. This serves to buttress our conclusion that the loss and restriction of the earned privileges corresponding to Level III status solely for refusing to provide incriminating information constitute potent and substantial

[11] The Supreme Court's decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), although a due process case, also supports the view that the privilege/penalty distinction is useful in determining the existence of a constitutional right. In *Greenholtz*, the Court concluded that due process protections do not arise simply because the state holds out the possibility of release on parole. *See id.* at 11. In reaching this conclusion, the Court specifically contrasted the granting of parole with the revocation of parole. *See id.* at 9-11. The Court emphasized that "there is a human difference between losing what one has and not getting what one wants.... That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained." *Id.* at 10-11.

penalties that would likely cause Plaintiff to feel that he has no choice other than to incriminate himself.

The second consideration that bears on whether the government has sought to compel self-incrimination is the automaticity of the penalty. The district court found that "the prison administrative sanctions attendant to [P]laintiff's refusal, automatically imposed by operation of IMPP 11-101," *Lile*, 24 F. Supp. 2d at 1158, are "impermissibly coercive" because they present a "costly burden to [P]laintiff's exercise of his rights under the Fifth Amendment." *Id.* at 1159. In several Supreme Court cases which all deal with attempts by prisoners or parolees to invoke the Fifth Amendment privilege and which hold that no constitutional violation occurred, none of the prisoners or parolees were automatically penalized for asserting the privilege. *See, e.g., Woodard*, 523 U.S. 272, *Murphy*, 465 U.S. at 429, and *Baxter*, 425 U.S. 308. We believe that the distinction between an automatic and a conditional consequence is helpful in determining whether government action rises to the level of compulsion. *See Cunningham*, 431 U.S. at 808 n. 5 (distinguishing *Baxter* on the ground that the penalty in that case was not imposed automatically). That said, the automaticity of a consequence is not dispositive in our determination because it fails to take into account the severity of the penalty. It remains worth noting that, unlike the consequences at issue in *Woodard*, *Murphy*, and *Baxter*, the adverse consequences in this case would be imposed on Plaintiff automatically once he refused to admit responsibility and disclose his sexual history and thereby refused to participate in the SATP. *See* App., Vol. 1 at 24 ("An inmate shall be automatically reduced to Level I for ... [r]efusal to participate in the recommended programs at the time of placement." (IMPP 11-101, pt. IV.B.2.)).

3. Constitutional Violation

For the foregoing reasons, we hold that there is a "reasonable basis for concluding that [Defendants] attempted

to attach an impermissible penalty to the exercise of the privilege against self-incrimination." *Murphy*, 465 U.S. at 437. The consequences that the Department would impose unless the constitutional privilege is surrendered in this case are sufficiently potent and substantial to constitute impermissible compulsion. Notwithstanding a Department regulation instructing that an "inmate shall not be penalized for refusal to participate in a formal program plan," Kan. Admin. Reg. § 44-5-105(c)(1), the policy that forces Plaintiff to choose between admitting incriminating information required for participation in the SATP and incurring the substantial and potent penalties that would be imposed if he refused to participate is "capable of forcing the self-incrimination which the Amendment forbids." *Cunningham*, 431 U.S. at 806; *cf. State v. Imlay*, 249 Mont. 82, 813 P.2d 979, 985 (1991) (ruling that Fifth Amendment was violated where defendant's probation was revoked for his refusal to admit under a court-ordered sexual treatment program that he was guilty of the crime of which he had been charged and convicted). In sum, the State has violated Plaintiff's Fifth Amendment right against self-incrimination.

C. Balancing

Although we have determined that there has been a violation of Plaintiff's constitutional right against self-incrimination, our analysis is not complete. Because of the institutional context of this case and the great deference that is owed to the management decisions and policies of prison officials, we believe it is appropriate to balance the prison's penological interests against the prisoner's constitutional right.[12] The Supreme Court routinely assesses the

[12] This balancing differs from Defendants' argument that government interest is significant in determining whether the Fifth Amendment has been violated because we apply the balancing analysis only after a constitutional violation has been found.

constitutionality of prison regulations and practices by examining whether the prison policy at issue "is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *accord Frazier v. Dubois*, 922 F.2d 560 (10th Cir. 1990). Though we are mindful of the historical importance of the right against self-incrimination, which emerged as a reaction to coercive and oppressive tactics used in the Spanish Inquisition, in the persecution of the Puritans in England, and by British colonial officials, we see no reason not to apply the balancing test of *Turner* here.

As a threshold matter, we examine whether the State has articulated its interests in requiring a participant in the SATP to disclose past sexual history. Though much of the State's briefs focus on its argument that the Fifth Amendment does not apply because Plaintiff has no protected liberty interest and because the benefits withheld did not constitute compulsory penalties, it is perfectly obvious from the briefs and the record that the State has two interests that are served by the SATP and its transfer policy: promoting rehabilitation and increasing public safety. For example, the State says:

> [T]he treatment of sex offenders serves the laudable goal of protecting the citizens of the state of Kansas. Additionally, as part of sexual abuse treatment, it is necessary for the participant to accept responsibility for his or her actions otherwise treatment will not be effective. These substantial interests of the State of Kansas justify the Department of Corrections' interest in offenders participating in SATP to accept responsibility for their deviant behavior.

Appellants' Br. at 21. The State also emphasizes that "the Department of Corrections is justified in concluding that ... plaintiff and society would benefit from his meaningful participation in a treatment program. Meaningful participation would include a full and honest assessment of plaintiff's sexual deviances." *Id.* at 22; *see also id.* at 4, 5, 13; Third Br. on

Cross Appeal at 3, 8. Thus, it is clear that the State's interests in rehabilitation and public safety are legitimate penological interests for its admission-of-responsibility policy. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (stating that legitimate penological objectives include "rehabilitation, deterrence and security"). *But cf. Mace v. Amestoy*, 765 F.Supp. 847, 852 (D.Vt. 1991) (stating that, while "the state has a legitimate rehabilitative purpose in demanding full disclosure" in a sex offense treatment program, the interest "does not make the disclosure any less incriminating" or violative of the Fifth Amendment privilege).

Because we believe that the prison policy impinges on Plaintiff's constitutional right against self-incrimination, we must determine whether the policy "is reasonably related to legitimate penological interests," *Turner*, 482 U.S. at 89, by weighing the following four factors: (1) whether there is "a 'valid, rational connection' between the prison regulation [or practice] and the legitimate governmental interest" advanced as its justification, *id.* at 89; (2) whether there are "alternative means of exercising the [constitutional] right" that remain open to prisoners notwithstanding the policy or regulation, *id.* at 90; (3) what impact accommodation of the right would have on guards, other inmates, and the general allocation of prison resources, *see id.*, and (4) whether there are obvious, easy-to-implement alternatives that would accommodate the prisoner's right at little cost to valid penological interests. *See id.* at 90-91.

It appears that the first question is answered in the affirmative: There is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, most mental health experts agree that "a sex offender must admit his guilt for treatment and rehabilitation to be successful." Brendan J. Shevlin, Between the Devil and the

Deep Blue Sea: A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt, 88 Ky. L.J. 485, 485 (2000); *see also* Jonathan Kaden, Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination, 89 J.Crim. L. & Criminology 347 (1998). This factor obviously weighs in favor of the State.

Second, there is no evidence that Plaintiff has any alternative means of exercising his Fifth Amendment right against self-incrimination. This is not like a case where a prisoner may have alternative means of exercising his First Amendment right to free exercise of religion. *See, e.g., Shabazz*, 482 U.S. at 351-53 (treating the ability of Muslim prisoners to participate in other religious observances of their faith as one factor supporting the reasonableness of a restriction on the right of prisoners to attend Jumu'ah services); *Stewart v. Thomas*, 176 F.3d 489, 1999 WL 203165, at *3 (10th Cir. 1999) (Table) (determining that Muslim inmate retained an alternative means of exercising his constitutional right because prison completely removed pork from the menu and inmates were able to eat meals before sunrise and after sundown). This factor weighs in favor of Plaintiff.

With respect to the third factor, there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources. In fact, there is no suggestion that Plaintiff is a security or behavioral risk other than that he is not participating in the behavioral treatment program because he refuses to give up his Fifth Amendment right. This case clearly does not implicate the management and security of the prison population at large, but instead focuses on the rehabilitation of sex offenders in general and an individual prisoner specifically. If this factor weighs at all, it probably weighs slightly in favor of Plaintiff.

Fourth, the most "obvious, easy alternative" to the challenged policy would be one that has been contemplated by the Supreme Court since the very inception of the Fifth Amendment right against self-incrimination-granting immunity or privileging the statements disclosed. *See, e.g., Murphy*, 465 U.S. at 436 n. 7; *Brown v. Walker*, 161 U.S. 591, 594-95 (1896). Many states, in fact, already incorporate some system of confidentiality into their treatment programs. *See, e.g.*, Cal. Evid. Code §§ 1012, 1014 (governing confidentiality of patient-psychotherapist in sex offender treatment program); Ky. Rev. Stat. Ann. § 197.440 (providing generally that admissions made within sex offender treatment program are privileged communications not subject to disclosure in civil or criminal proceeding); *see also Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999) (noting district court's ruling that any admission of guilt required by sex offender treatment program would be privileged communication not subject to disclosure in a judicial proceeding under Alabama law); *Chambers v. Bachicha*, 1994 WL 596702, at *3 (noting Colorado Department of Corrections' Administrative Regulation 950-5 providing for confidentiality of prison records); *Tedder v. Francke*, 1991 WL 65497, at *2 (stating that admissions made during sex offender treatment program were privileged under Oregon evidentiary rule, Or. Rev. Stat. § 40.230). An obvious tension exists between the goal of rehabilitation and the threat of further prosecution, a tension that would be eased by granting immunity or privileging statements. *See* Shevlin, 88 Ky. L.J. at 491-92, 500-02; Kaden, 89 J.Crim. L. & Criminology at 385-89. We are inclined to believe that prisons may better accomplish their goal of rehabilitation if they encourage inmates to admit their sex offenses by granting immunity or making statements privileged.[13]

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[13] While there may be incrimination problems for future perjury which is typically not immunized, any perjury in this case stemming from a not-guilty plea would be past perjury and would be immunized like other past crimes.

The State claims that it "is not required to pursue its interest in having offenders sentenced to its custody participate in sexual abuse treatment at the expense of foregoing the criminal prosecution of sex crimes." Third Reply Br. at 13. The Supreme Court has stated, however:

> The privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

New Jersey v. Portash, 440 U.S. 450, 457-58 (1979) (*quoting Kastigar v. United States*, 406 U.S. 441, 453 (1972)). Accordingly, an inmate like Plaintiff would not be immunized from any and all prosecution. Rather, he would receive immunity only from prosecution that is based on his immunized statements. Therefore the State does not lose anything it has not already lost because Plaintiff here invokes his right against self-incrimination and refuses to admit responsibility for his offense of conviction and disclose his sexual history without being immunized.

In our view, this fourth factor weighs heavily in favor of Plaintiff. The prison can preserve its goal of reinforcing constructive behavioral changes in sex offenders, and Plaintiff's right against self-incrimination is not compromised because he is granted immunity for his disclosures (or such statements are privileged).

In sum, the real balance turns on the seriousness with which we have always treated the Fifth Amendment right

against self-incrimination against the ease with which the State can accommodate or satisfy this right and still meet its legitimate program objectives. Because granting immunity or privileging statements in no way restricts the State's interests in rehabilitation or public safety, we think the *Turner* balancing easily weighs in favor of Plaintiff. While we applaud the efforts of states to rehabilitate prisoners, especially where their crimes involve sexual offenses and abuse of children, they may not tie rehabilitation to an inmate's surrender of his Fifth Amendment right against self-incrimination where the *Turner* balancing weighs in favor of the inmate. Therefore, we conclude that the policy is not reasonably related to legitimate penological objectives, and we hold that it violates Plaintiff's Fifth Amendment right against self- incrimination. We accordingly affirm the district court's judgment granting summary judgment to Plaintiff on his Fifth Amendment claim. Though the State cannot penalize Plaintiff for invoking his Fifth Amendment right in this case, it can determine if it wishes to modify its program by implementing a system of confidentiality or granting immunity.

II. Fourth Amendment

Because we have determined that the Kansas SATP unconstitutionally violates Plaintiff's Fifth Amendment right against self-incrimination, his appeal on the Fourth Amendment claim is moot. We therefore vacate the portion of the district court's judgment granting summary judgment to Defendants on the Fourth Amendment claim and remand to the district court with instructions to dismiss that claim as moot.

AFFIRMED in part and VACATED and REMANDED in part.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff, v. DAVID R. MCKUNE, et al., Defendants.	No. 95-3266-DES

Sept. 16, 1998

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

Plaintiff, a prisoner confined in Lansing Correctional Facility in Lansing, Kansas, proceeds in forma pauperis and with appointed counsel to challenge the constitutionality of a sex offender treatment program required by the Kansas Department of Corrections ("DOC"). Before the court are cross motions for summary judgment by the parties.

BACKGROUND

A jury convicted plaintiff in 1983 of kidnaping, rape, and aggravated sodomy. Plaintiff denied all charges and testified at trial that his conduct with the victim, including sexual intercourse, was consensual. The Kansas appellate courts affirmed plaintiff's conviction. At the time he filed his complaint, plaintiff had a petition for writ of habeas corpus under 28 U.S.C. § 2254 pending before this court in which he alleged constitutional error in his state court conviction.

Plaintiff is currently incarcerated at Lansing Correctional Facility ("LCF") in Lansing, Kansas, serving a controlling life sentence.

When plaintiff was first incarcerated, DOC staff determined the sex offender treatment program would not be required. In 1994, plaintiff's Unit Team Counselor added the Sex Offender Treatment Program ("SOTP," the precursor to the current program, Sexual Abuse Treatment Program "SATP"), a clinical rehabilitation program, to plaintiff's inmate program agreement ("IPA"). After exhausting administrative remedies on an unsuccessful grievance challenging the addition of this programming, plaintiff signed the modified IPA, but refused to participate in the recommended program which required the signing of an "Admission of Guilt" form.[1]

In 1995, DOC amended state regulations[2] and revised its internal management policies and procedures ("IMPP"). The revised IMPP 11-101, effective January 1, 1996, is characterized as an incentive level system that links privileges and custody classifications to successful prison accomplishment, such as the completion of required programming. As applied to plaintiff, the documented failure to complete a recommended program on his IPA would automatically impair his ability to earn good time, and would result in his transfer to maximum custody and the loss of

[1] After plaintiff filed this lawsuit, DOC retitled the "Admission of Guilt" form to read "Admission of Responsibility," and added the statement that SATP was a voluntary program.

[2] The 1995 amendments to K.A.R. 44-6-124 and 44-6-142 provide for the withholding of 100% of the good time credits for each classification review period of an inmate who refuses to participate in assigned programming. The 1995 amendments further require that all good time credits are now to be earned as the sentence progresses, rather than presumed based upon the maximum sentence and subject to forfeiture only for misconduct.

privileges for that review period. These consequences, acknowledged as part of the "incentive" for completion of recommended programming, mirror the consequences imposed for serious disciplinary infractions.[3]

The resulting conditions in maximum custody go beyond the lack of a personal television. Plaintiff would be placed in a more dangerous environment occupied by more serious offenders. He would not be able to earn more than $0.60 a day for prison pay, and he would not be eligible for industries work. Visitation would be restricted to attorneys, clergy, law enforcement and his immediate family. Other approved visitors would not be allowed. Available programming would be limited, as would the amount of personal property he could retain in his cell.

In addition to signing an "Admission of Guilt" form, plaintiff objected to the SATP requirement that all participants generate a written sexual history which includes all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses. Polygraph examinations are used to verify the accuracy and completeness of the offender's sexual history. Plethysmograph testing is used for diagnostic and treatment purposes. The results of the plethysmograph and polygraph exams are to be discussed in group therapy sessions. Although participants are instructed to keep confidential the information elicited during the therapy sessions, and may be terminated from the program for failing to do so, the confidentiality of this information is expressly limited. The parties acknowledge that Kansas law requires

[3] The policy, as clarified February 1, 1996, also automatically subjects a prisoner to the same restrictions upon a disciplinary work conviction, upon the filing of felony charges by a state prosecutor, or upon disciplinary convictions for serious offenses such as theft, riot, arson, relationship with staff, and possession of contraband. IMPP 11- 101, Section IV.B.1-4.

SATP staff to report any disclosed uncharged sexual offense,[4] and that all SATP participant files are subject to subpoena.

In cross motions for summary judgment, the parties seek resolution of two constitutional issues. The first is whether the operation of the SATP and related prison regulations and policies violates plaintiff's constitutional right against self incrimination. Second is whether the SATP Program at LCF is conducted in a manner impermissibly invasive of plaintiff's constitutional right to privacy and bodily integrity.

SUMMARY JUDGMENT STANDARDS

Under the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing summary judgment motions, the evidence must be viewed in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

The fact that both parties have filed cross-motions for summary judgment does not change this standard of review. *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 249 (6th Cir. 1991). The court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under

[4] *See* K.S.A. 38-1522 (mandated reporting of abuse or neglect of children).

consideration. *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

DISCUSSION

Fifth Amendment

Fifth Amendment, applicable to the states through the Fourteenth Amendment,[5] provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Art. V. The Amendment "must be accorded liberal construction in favor of the right it was intended to secure," *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951), and it clearly extends to incarcerated prisoners, *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

The constitutional right against self-incrimination turns not on the type of proceeding, but the nature of the statement or admission that is invited. *Estelle v. Smith*, 451 U.S. 454, 462 (1981). The Fifth Amendment "privileges [the individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings ... unless and until he is protected at least against the use of his compelled answers." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973)).

The privilege should be affirmatively and timely asserted. *Murphy*, 465 U.S. at 429. A state does not abridge the right against self-incrimination when an individual waives the privilege by communicating voluntarily. *U.S. v. Washington*, 431 U.S. 181, 186 (1977).

There is a longstanding Supreme Court directive that the privilege against self- incrimination is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The "mischief" identified in the

[5] *Malloy v. Hogan*, 378 U.S. 1 (1964).

present case involves the State's acquisition of therapeutic confessions in the SATP Program at LCF.

Plaintiff first claims the significant adverse regulatory consequences attendant to his refusal to fully participate in the SATP Program at LCF unconstitutionally compels his disclosure of potentially incriminating information without the protection of immunity.[6] Secondly, plaintiff claims he should not be punished by operation of IMPP 11-101 for asserting his right against self incrimination.

Defendants contend the Fifth Amendment is not applicable to this non-criminal setting, and maintain there is no compulsion in this voluntary program. Defendants further argue the withholding of discretionary privileges is allowable if plaintiff refuses to participate in required prison programming. Defendants do not dispute plaintiff's claim that no express immunity is provided to SATP participants.

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[6] Plaintiff also contends the incriminating information could be used in a commitment proceeding against him under the Kansas Commitment of Sexually Violent Predators Act, K.S.A. 59-29a01 *et seq.*

The protection of the Fifth Amendment bars the use of compelled self-incriminating statements in a later criminal action against the declarant. It does not bar the use of such statements in a later civil proceeding. *See e.g., Allen v. Illinois*, 478 U.S. 364 (1986) (Fifth Amendment did not apply to civil involuntary commitment of sexually dangerous person). *Accord, Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998) (Fifth Amendment does not apply to SATP disclosures used in civil involuntary commitment proceedings).

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court found the commitment proceedings under the Kansas Act to be civil in nature. Thus, it is now clear that in such proceedings, the Fifth Amendment privilege against self incrimination would not be offended by the use of incriminating information elicited in the sex offender treatment program.

The court first examines whether there is merit to plaintiff's Fifth Amendment claim, and if so, the remedy to afforded in this case.

Fifth Amendment—Incrimination

The court easily finds the information required to be disclosed under the SATP Program is sufficiently incriminating for Fifth Amendment purposes.

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87. The privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. U.S.*, 406 U.S. 441, 445 (1972). Although the fear of prosecution must have some foundation, the assertion of the privilege does not depend on the likelihood of future prosecution. *U.S. v. Jones*, 703 F.2d 473, 477-78 (10th Cir. 1983).

By requiring the complete and written disclosure of a prisoner's sexual history, including all uncharged sexual offenses, SATP clearly seeks information that could incriminate the prisoner and subject him to further criminal charges.[7]

Because the sexual history disclosure clearly satisfies the incrimination inquiry, the court does not decide whether a

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[7] Where no confidentiality is afforded such disclosures in SATP, similar programs operating with greater confidentiality can be easily distinguished. *See Chambers v. Bachicha*, 39 F.3d 1191 (unpublished decision), 1994 WL 596702 (10th Cir. 1994) (no Fifth Amendment violation found, in part, due to recognized confidentiality of prison records, and no evidence that confidentiality provision had been or ever would be breached).

written "admission of responsibility" of plaintiff's behavior leading to his convicted offense, standing alone, would be sufficiently incriminating to invoke the protection of the Fifth Amendment.[8]

Fifth Amendment—Compulsion

The court also finds the SATP Program at LCF, in conjunction with DOC policies and practices, operates to compel the disclosure of such incriminating testimony.

Compulsion is the "touchstone of the Fifth Amendment." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). While there is no compulsion if the incriminating testimony elicited is truly voluntary, the undisputed facts in the record do not lead to such a finding in this case.

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[8] Courts are not hesitant to find incrimination if a prisoner's direct appeal could be affected by such an admission. *See e.g., Taylor v. Best*, 746 F.2d 220, 222 (4th Cir. 1984) (privilege against self-incrimination applies to questioning about the charged offense while the declarant's appeal from that conviction is pending), *cert. denied*, 474 U.S. 982 (1985). It is also recognized that an admission after the exhaustion of the direct appeal may still be incriminating. *State of Montana v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991) (post-conviction remedies would be rendered meaningless by compelled admission of guilt), *cert. granted*, 503 U.S. 905, *cert. dismissed as improvidently granted*, 506 U.S. 5 (1992).

In this case, plaintiff's conviction has been rendered final by exhaustion of all direct review. Any admission of guilt now only potentially threatens collateral review, and has only a distant or speculative chance of affecting this presumptively valid conviction. *See e.g., Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997) (where no challenge to the conviction and no evidence that the inmate intends attempt to withdraw plea, there is only a remote and speculative possibility that inmate's admission to sex offenses will be incriminating in a future criminal proceeding). There still remains, however, the possible criminal charge of perjury where plaintiff testified in court that he did not commit the offense, and then declares otherwise in a written "admission of responsibility." *See* K.S.A. 21-3805 (criminal offense of perjury).

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court held that the pressure to divulge potentially incriminating evidence in a voluntary clemency interview does not constitute compulsion under the Fifth Amendment. *Id.* That holding rests squarely on a finding that the clemency proceeding was voluntary. Other than the consequence to the prisoner's chance of obtaining clemency, no automatic administrative sanction attached to that prisoner's refusal to divulge the requested information. This is consistent with Supreme Court precedent that the choice to waive the privilege against self-incrimination is considered voluntary only if the individual suffers no such penalty as a result.[9] *Murphy*, 465 U.S. at 428.

However, when the government compels incriminating testimony by threat of "potent sanctions," the testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a later criminal proceeding. *Cunningham*, 431 U.S. at 805 (*citing Garrity v. State of N.J.*, 385 U.S. 493 (1967)). A waiver secured under threat of such sanction cannot be termed voluntary. *Turley*, 414 U.S. at 82-83.

In the present case, plaintiff's refusal, on constitutional grounds, to participate in the SATP Program would be considered voluntary within the ambit of *Woodard* if the consequences were limited to the effect of such refusal on the parole board's discretionary decision of whether to grant plaintiff parole. However, the prison administrative sanctions

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[9] *Woodard* also reflects court decisions finding no Fifth Amendment violation in presenting a criminal defendant with difficult or tactical choices such as waiving the right against self-incrimination by entering a guilty plea, *Godinez v. Moran*, 509 U.S. 389, 398 (1993), or admitting responsibility for the purpose of obtaining a reduction in sentence, *e.g. U.S. v. Trujillo*, 906 F.2d 1456 (10th Cir.), *cert. denied*, 498 U.S. 962 (1990).

attendant to plaintiff's refusal, automatically imposed by operation of IMPP 11-101, clearly go further and defeat defendants' claim that plaintiff's participation in the challenged program constitutes a voluntary waiver of plaintiff's rights under the Fifth Amendment.[10]

The Kansas Supreme Court recently found SATP's required "admission of responsibility" and disclosure of uncharged sexual offenses violated a prisoner's rights under the Fifth Amendment. *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998). In that case, as in the case presently before this court, the prisoner-plaintiff had asserted his right under the Fifth Amendment in refusing to comply with SATP programming requirements. Each testified at trial to deny the offense, and thus was subject to the charge of perjury upon an admission of guilt in SATP. Each had some form of judicial review of his conviction pending at the time he was required to comply with SATP program requirements.

The compulsion identified in *Bankes* arose out of the state prison regulations applicable to the prisoner's refusal to participate in the SATP Program. The Kansas Supreme Court found operation of the 1995 state regulations unconstitutionally

[10] The court notes defendants' insistence that IMPP 11-101 involves the withholding of administrative "incentives" rather than imposition of administrative "sanctions." The distinction has little significance where plaintiff faces the loss of present and more favorable classification and privileges solely as a result of his refusal, on constitutional grounds, to participate in the SATP Program.

The court further finds the administrative sanctions at issue operate automatically upon plaintiff's refusal to comply with the SATP Program requirements. Although defendants indicate prisoners can successfully complete the SATP Program at LCF without undergoing the plethysmograph and polygraphy testing, their examples cite individuals in the program before such testing was implemented, or individuals with medical problems. There is nothing in the record to suggest that plaintiff would fit either category.

lengthened the prisoner's period of incarceration by withholding good time credits that had been presumed in calculating the prisoner's conditional release date upon his incarceration prior to the 1995 change in the regulations.

In the present case, plaintiff's argument focuses instead on the operation of prison policy IMPP 11-101 which imposes significant and adverse consequences to plaintiff's classification, housing, and privileges if he refuses to participate in the required programming.

The adverse consequences of prison policies and practices have been examined in the context of raising a constitutional claim. In *Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994), the court recognized that although the challenged urinalysis testing was reasonable under the Fourth Amendment, the adverse consequences attendant to the prisoner's refusal to submit to testing were sufficient to establish standing to raise the constitutional claim.[11]

Here, defendants essentially argue that no compulsion results pursuant to the adverse consequences under the revised IMPP 11-101 because no protected liberty interest is implicated where the prisoner is not subjected to conditions atypical to his incarceration. *See e.g., Bollig v. Fiedler*, 863 F. Supp. 841 (E.D. Wis. 1994) (due process claim defeated because no protected liberty interest in right to be free of forced participation in prison educational rehabilitation program).

However, by grafting a protected liberty interest to a finding of compulsion, the standard is set too high. Whereas no *atypical* hardship may be at issue, and thus no threat to an interest protected by the Due Process Clause, there remains the

[11] The Fifth Amendment claim in *Lucero* was defeated because blood and urine samples were nontestimonial evidence, and thus did not implicate prisoner's right against self-incrimination.

possibility that the hardship attendant to a prisoner's refusal to participate in the SATP Program is sufficient compulsion for purposes of the Fifth Amendment. The Supreme Court has recognized that compulsion under the Fifth Amendment can be established by the threat of a substantial economic burden, notwithstanding the fact that no enforceable property interest or claim may be at risk. *Cunningham*, 431 U.S. at 807.

Within the context of plaintiff's incarceration, operation of IMPP 11-101 clearly presents such a costly burden to plaintiff's exercise of his rights under the Fifth Amendment. *See e.g. Neal*, 131 F.3d at 829 (coercive effect of sex offender treatment program recognized where non-completion of program renders inmate ineligible for parole); *McMorrow v. Little*, 109 F.3d 432 (8th Cir. 1997) (Fifth Amendment protects prisoner's refusal to admit to crime where prisoner threatened with loss of benefits, including the withholding of parole and work release, and the withholding of less restrictive confinement).

If such administrative consequences were not present, IMPP 11-101 would not be impermissibly coercive under the Fifth Amendment. *See e.g., Russell v. Eaves*, 722 F. Supp. 558 (E.D. Mo. 1989) (no compulsion found in the acceptance of responsibility by prisoners in state sexual offender treatment program where prisoners could refuse to participate and no administrative consequences identified as automatically attendant to such refusal), *appeal dismissed*, 902 F.2d 1574 (8th Cir. 1990).

Fifth Amendment—Immunity

The court next turns to the consequences resulting upon plaintiff's valid assertion of his rights under the Fifth Amendment.

It is clear that citizens may not be forced to incriminate themselves simply because it serves a governmental need. *Turley*, 414 U.S. at 78-79. A legitimate state rehabilitative

purpose for compelling disclosure does not make the disclosure any less incriminating. *Mace v. Amestoy*, 765 F.Supp. 847, 852 (D. Vt. 1991).

The Supreme Court has recognized that if prisoners are compelled "to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered whatever immunity is required to supplant their privilege and may not be required to waive such immunity." *Baxter*, 425 U.S. at 316 (quotations omitted). The sensible administration of a state rehabilitative system can create the need for a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Turley*, 414 U.S. at 81 (*quoting Kastigar*, 406 U.S. at 446).

Thus the state may, without violating the Fifth Amendment, require answers to potentially incriminating questions "as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Murphy*, 465 U.S. at 436 n. 7. *See e.g. Baxter*, 425 U.S. at 318-19 (where immunity against use of incriminating disclosures in subsequent criminal proceedings is assumed, Fifth Amendment did not bar use of inmate's silence in prison disciplinary proceedings).[12] *See Grand Jury*

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[12] At issue in *Baxter* was the adverse use of a prisoner's silence at his disciplinary hearing. Recognizing the competition between the individual's assertion of privilege and the state's interest in prison disciplinary management, the Court authorized the imposition of consequences if the prisoner failed to answer questions that served state interests beyond that of a criminal conviction. *Accord, Shimabuku v. Britton*, 503 F.2d 38, 45 (10th Cir. 1974) (use immunity for statements given in prison disciplinary proceeding accommodated competing interests in self-incrimination privilege and prison discipline).

See generally, Solkoff, Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs, 17 Nova L. Rev. 1441 (1993) (courts to invest probationers with immunity to

Subpoenas Dated Dec. 7 and 8, to Stover v. U.S., 40 F.3d 1096, 1102-03 (10th Cir. 1994) (scope of immunity against use of compelled self- incriminating statements outlined, following *Garrity*), *cert. denied*, 514 U.S. 1107 (1995).

The Kansas Supreme Court followed such course by extending immunity to incriminating SATP disclosures made by prisoners subject to the unconstitutional withholding of good time under the amended state regulations. *Bankes*, 265 Kan. 341, 963 P.2d 412, 1998 WL 289193 at *9. This court follows the same path. Where a prisoner asserts his constitutional right against self incrimination in the SATP Program at LCF, immunity protects all incriminating disclosures compelled by the operation of prison policy IMPP 11-101 from being used against plaintiff in later criminal proceedings.[13]

Notwithstanding the court's decision that interference with DOC's SATP programming is not required, plaintiff has sustained his burden of demonstrating constitutional error and has obtained judicial relief on the claim. Plaintiff is granted summary judgment on his Fifth Amendment claim.

Right to Privacy

Plaintiff claims the plethysmograph testing in the SATP Program violates his constitutionally protected right to privacy and bodily integrity.

Defendants use a penile plethysmograph examination in the SATP Program at LCF to develop specific treatment plans

protect Fifth Amendment privilege and to further mandated treatment).

[13] The court is not required to consider whether the refusal to comply with SATP disclosure requirements without assertion of the privilege is sufficient to satisfy any of the recognized exceptions to the general rule that the Fifth Amendment is not self-executing. *See e.g.*, Murphy, 465 U.S. at 434-35 (if sufficient penalty asserted for exercise of privilege, failure to assert privilege is excused).

for the participating inmate. The plethysmograph assesses the degree of a test subject's sexual arousal, through changes in penile tumescence. The testing employs an electronic device consisting of a pressure- sensitive ring which is placed around a subject's penis to measure and record increases in penis size in response to various audio recordings of projective sexual scenarios presented from the perspective of a person committing a sexual offense. Inmates describe the audio recordings of various sexual scenarios as lasting about 40 minutes, and as including graphic and violent scenes of nonconsensual sexual behavior.

Plaintiff maintains he has a constitutional right to refuse plethysmograph testing[14] in the SATP Program at LCF. He claims plethysmography is an extremely intrusive procedure which is not accepted as scientifically valid and reliable, especially if such testing is against the prisoner's will. Plaintiff further maintains the testing at LCF is conducted by unqualified and untrained personnel.

Defendants contend there is no privacy invasion because the program is voluntary, the nature of the program and testing is fully disclosed so that an inmate can make a knowledgeable decision to participate, and the inmates are not viewed or touched during the testing.

Among the uncontroverted facts in the record is the recognition that it is critical for the SATP clinician to create a therapeutic alliance with the sex offender to ensure successful rehabilitation and to ensure the sex offender is sincerely motivated to work on controlling his deviant behavior. The

[14] Plaintiff also claims he has a constitutional right to refuse polygraph testing. Plaintiff's allegations regarding this form of testing rest on the alleged unreliability of the procedure. He does not allege the polygraph testing in the SATP Program at LCF invades a protected privacy interest. The court's analysis of plaintiff's Fourth Amendment privacy claim thus focuses on the challenged plethysmograph testing.

parties disagree whether IMPP 11-101 constitutes sufficient coercion to interfere with this requisite alliance. The assessment report prepared by the National Institute of Corrections, and used by defendants to develop the current SATP Program, does not address the need for, or the effect of, an incentive policy like that adopted in IMPP 11- 101. The parties disagree whether a successful sex offender treatment program requires plethysmograph testing.

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Constitution, Art. IV. Where personal and deeply rooted privacy concerns are implicated, the Fourth Amendment "guarantees the privacy, dignity and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989) (citations omitted). It protects against intrusions not justified by the circumstances, or conducted in an improper manner. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Although convicted prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison," *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), the Supreme Court has recognized that incarceration necessarily limits the privileges and rights of convicted prisoners, *Pell v. Procunier*, 417 U.S. 817 (1974). It is established, for instance, that prisoners have no legitimate expectation of privacy in their cells, and that absent substantial evidence in the record that officials have exaggerated their response, a prisoner's expectation of such privacy must yield to institutional security concerns. *Wolfish*, 441 U.S. at 547-48; *Hudson v. Palmer*, 468 U.S. 517 (1984).

A search of a prisoner's body, however, is a qualitatively different matter. *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990). A prisoner retains a privacy interest in the integrity of his own person.

Wolfish, 441 U.S. at 558. *See e.g. Hayes v. Marriott*, 70 F.3d 1144, 1146 (10th Cir. 1995) (prisoner retains limited constitutional right to bodily privacy, particularly as to searches by staff members of opposite sex); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards).

A State's acquisition and examination of evidence may be a search under the Fourth Amendment if such governmental action "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner*, 489 U.S. at 616. Accordingly, the collection of revealing private physiological data has been found to be an invasion of privacy interests. *Id.* at 617.

Whether the government is pursuing civil or criminal objectives, such intrusion into constitutionally protected privacy rights requires analysis of the reasonableness of the search under the Fourth Amendment. "[T]he permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner*, 489 U.S. at 619 (quotation and citations omitted). *See e.g., Dunn*, 880 F.2d at 1193-94 (prison officials to balance intrusiveness of testing prisoner's blood for AIDS against the need for such testing). The reasonableness of the intrusion requires the examination of the nature of the search and of all the surrounding circumstances. *Skinner*, 489 U.S. at 619. Where privacy expectations are reduced and the intrusion of privacy interests is minimal, the Fourth Amendment demands less governmental justification than where a heightened privacy interest is involved. *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992).

In the present case, the court finds plaintiff's constitutionally protected right to privacy and bodily integrity

is clearly implicated.[15] Similar to the Fourth Amendment protection extended to the collection and testing of urine in *Skinner*, plethysmograph testing requires the physical involvement of arguably the most private part of the inmate's body, for the purpose of recording and monitoring the physiological disclosure of sensitive and revealing information about the inmate's sexual response.

Because the operation of IMPP 11-101 within the context of the SATP Program imposes consequences similar to prison disciplinary sanctions, the court finds sufficient compulsion for plaintiff to have standing to raise this constitutional claim. *See Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994) (standing to raise Fourth Amendment claim established by adverse disciplinary consequences attendant to inmate's refusal to undergo urinalysis testing).

The court thus turns to the government's need for the private information obtained in such testing, and the reasonableness of the testing procedure.

Because plaintiff is incarcerated, the court's examination is guided by the rational relationship test outlined by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the Court held that a prison regulation infringing on a constitutionally recognized right of a convicted prisoner is considered valid only if the regulation is reasonably related to

[15] The court rejects plaintiff's alternative claim under the Fourteenth Amendment that the SATP Program at LCF violates his right to refuse medical treatment. In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court recognized that an inmate retains a significant liberty interest, protected under the Due Process Clause, from being subjected to the arbitrary and erroneous forceful administration of medication. However, the rehabilitative treatment protocol being challenged in the present case is clearly distinguishable in its scope and purpose from the forced administration of anti-psychotic drugs in *Harper* as a medical response to a threat of danger to the inmate and to others at the facility.

a legitimate penological interest. *Id.* at 89. This is a less restrictive standard than ordinarily applied to the review of alleged violations of constitutional rights. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). The *Turner* "reasonableness" standard attempts to reconcile the Court's "longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Washington v. Harper*, 494 U.S. 210, 223-24 (1990).

In *Turner*, the court identified four factors to be considered in determining whether the prison policy in question is "reasonably related" to legitimate penological goals, or whether the policy reflected an "exaggerated response" to those concerns. 482 U.S. at 87. Courts have recognized that not all four factors are necessarily relevant to an inquiry in the context of the Fourth Amendment. *Dunn*, 880 F.2d at 1193 n. 3. *See* also *Michenfelder v. Sumner*, 860 F.2d 328, 331 n. 1 (9th Cir.1988); *Frink v. Arnold*, 842 F.Supp. 1184 (S.D. Iowa 1994), *aff'd*, 43 F.3d 673 (8th Cir.1994). Accordingly, the analysis of a prisoner's constitutional privacy claim has often centered on the first factor, which is whether a valid and rational connection exists between the regulation and the penological interest offered to justify the regulation.[16] The balancing test in *Wolfish* is used to guide that analysis. *Dunn*,

[16] Plaintiff argues the remaining *Turner* factors, which address whether reasonable alternatives exist that can both accommodate the prison's needs and protect an inmate's rights, should be examined as well, and contend the alternative available in this case is to allow testing without the compulsion operating under IMPP 11-101. However, *Dunn* instructs that "[o]nce a court has concluded that a prison search is not unreasonable, there is no infringement of a constitutional right, and thus the issue whether there is a possibility of 'accommodating' a prisoner's fourth amendment right by some other means would not arise." *Dunn*, 880 F.2d at 1194 n. 3.

880 F.2d at 1194 n. 3.; *Thompson v. Souza*, 111 F.3d 694, 699-700 (9th Cir.1997).

Here, the parties stipulate that the SATP Program at LCF is a clinical rehabilitative program. Rehabilitation is a legitimate penological objective. *See, O'Lone*, 482 U.S. at 348 ("limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives-- including deterrence of crime, rehabilitation of prisoners, and institutional security"). Thus the underlying reason for the SATP Program at LCF is legitimate.

Next, the intrusion into an inmate's right to bodily integrity is significantly mitigated in this case by the fact that SATP staff neither touch nor observe the inmate throughout the plethysmograph testing procedure. *Compare, Pierce v. Smith*, 117 F.3d 866, 875 (5th Cir.1997) (intrusiveness of search was minimal where urine sample was collected behind closed door and without monitor). The testing procedure is not videotaped and there is no threat of pain or harm to the inmate.

The court thereby finds the legitimate governmental interest in rehabilitation outweighs the intrusion inherent in the plethysmograph testing as it is conducted at LCF.[17]

The decisive and remaining inquiry is whether the treatment program itself bears a rational relationship to the rehabilitative purpose. *Dunn*, 880 F.2d at 1196. "[A]

[17] However, the collection of the responsive data from the plethysmograph testing is afforded minimal confidentiality. It is uncontroverted that plethysmograph test results are discussed in the group therapy sessions. There appears to be little attention to or justification for the disclosure of this sensitive and private information. *See e.g. Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) ("other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body"); *Skinner*, 489 U.S. at 617 (analysis of test data is further invasion of privacy interest).

regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 1194 (*quoting Turner*, 482 U.S. at 89-90).

Although penile plethysmograph testing is used in other sex offender treatment programs, the testing procedure has garnered only limited acceptance and credibility by the courts.[18] The reliability and usefulness of the testing outlined in the present case is further diminished by the DOC "incentive" program which does little to render an inmate's participation truly voluntary, and by the marginal training and expertise of the staff.

While the usefulness and reliability of the plethysmograph testing in the SATP Program at LCF may be strongly questioned, defendants' decision to employ the testing in the manner outlined in the record must be afforded broad deference unless the testing and use of the private information

[18] For evidentiary purposes in the courtroom, plethysmograph results have not been accepted as reliable enough for predictive or identification evidence in criminal cases, *see e.g., State v. Spencer*, 119 N.C.App. 662, 459 S.E.2d 812 (1995) (trial court properly excluded psychologist's testimony regarding plethysmograph testing, scientific community divided as to the reliability of the test to measure sexual deviancy), *rev. denied*, 341 N.C. 655, 462 S.E.2d 524 (1995), or in cases involving child custody or the termination of parental rights, *see e.g., In the Interest of A.V.*, 849 S.W.2d 393, 399 (Tex. App. 1993) (reservations noted regarding acceptance by scientific community of plethysmograph as valid indicator of sexual preference or disorder).

But see, State v. Riles, 135 Wash. 2d 326, 345, 957 P.2d 655, 664 (1998) (use and value of plethysmograph as treatment device recognized; testing provides useful information regarding the sexual arousal patterns of sex offenders, and data obtained can be used to assess baseline arousal patterns and therapeutic progress during treatment).

thereby obtained is devoid of probative and productive utility toward the stated rehabilitative purpose.[19]

Having considered the scope of the intrusion, the manner in which it is conducted, the justification for the procedure, and the place it is conducted, *Wolfish*, 441 U.S. at 559, the court finds the plethysmograph testing in the SATP Program at LCF intrudes upon plaintiff's constitutional right to privacy and bodily integrity, but finds defendants' governmental interest in rehabilitation outweighs plaintiff's right to be free from such intrusion. The court further finds the challenged testing procedure, and the related operation of "incentive" policy IMPP 11- 101, are both rationally related to the legitimate penological goal of rehabilitation of sex offenders, and reasonable enough to satisfy the review required under *Turner v. Safley*. Summary judgment is granted to defendants on plaintiff's Fourth Amendment privacy claim.

Pursuant to the court's Order dated April 23, 1996 (Doc. 94), the court enjoined defendants from coercing in any manner plaintiff's acceptance of or participation in SATP programming until the merits of plaintiff's claims were decided. The court continues this injunctive relief pending the final outcome of any appeal in this matter, or the termination of the time for filing an appeal.

IT IS THEREFORE BY THE COURT ORDERED that summary judgment is granted to plaintiff on plaintiff's Fifth Amendment claim.

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[19] The prison context of plaintiff's claims is clearly decisive. Compare *Harrington v. Almy*, 977 F.2d 37 (1st Cir.1992), in which a suspended police officer challenged the city manager's demand that the officer undergo plethysmograph testing as a condition of reinstatement. The Circuit Court reversed the grant of summary judgment to the defendants, noting the invasive and offensive nature of the plethysmograph testing, the unreliability of the procedure, and the lack of evidence that less intrusive means were not available. *Id.* at 44.

IT IS FURTHER ORDERED that summary judgment is granted to defendants on plaintiff's privacy claim.

IT IS FURTHER ORDERED that the temporary injunction granted to plaintiff in this matter (Doc. 94) is continued until the judicial disposition of plaintiff's claims are finalized through appellate review or until the time for seeking such appellate review has expired.